IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-17018

EARTH ISLAND INSTITUTE, *et al*,

Plaintiff-Appellees,

v.

CARLOS M. GUTIERREZ, *et al.*,

Defendant-Appellants.

Appeal from the U.S. District Court for the Northern District of California
(Thelton E. Henderson, Judge) CV-03-00007

REPLY BRIEF FOR FEDERAL APPELLANTS

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GLOSSARY

ETP	eastern tropical Pacific
CHESS	chase and encirclement stress study
CITES	Convention on the International Trade in Endangered Species
DPCIA	Dolphin Protection Consumer Information Act
GATT	General Agreement on Tariffs and Trade
IDCP	International Dolphin Conservation Program
IDCPA	International Dolphin Conservation Program Act
IATTC	Inter-American Tropical Tuna Commission
MMC	Marine Mammal Commission
NOAA	National Oceanic and Atmospheric Administration
NMFS	National Marine Fisheries Service
ODP	Organized Decision Process
PBR	potential biological removal
Secretary	Secretary of Commerce

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INTRODUCTION

The district court erred in setting aside the Secretary's Final Finding that the chase-and-encirclement method of fishing for tuna in the eastern tropical Pacific is not having a significant adverse impact on depleted dolphin stocks. As demonstrated in our opening brief, the court applied an erroneous legal standard – the mistaken view that the IDCPA requires the Secretary to resolve any scientific uncertainty by giving the "benefit of the doubt" to the depleted dolphin species – and failed to give the requisite deference to the agency's choices of methodology and scientific judgements. The court also erred in holding that the Final Finding was based on policy and political concerns rather than the best available science. The court improperly disregarded the Secretary's stated rationale for the finding, which was purely scientific, and instead substituted its own views of the factors motivating the Secretary's decision.

Our opening brief also demonstrated that even if the court's decision setting aside the Final Finding were correct, the remedy ordered by the court is unduly restrictive. Absent extraordinary circumstances, the appropriate remedy under the Administrative Procedure Act for agency action found to be arbitrary or capricious is to vacate and remand to the agency for further proceedings. Here, the court's order effectively prohibits the agency from correcting the alleged deficiencies

found by the court, and thus prevents the Secretary from completing his congressionally mandated duties under the IDCPA. Nothing in the IDCPA or the record of this case justifies such a remedy.

As we demonstrate below, Earth Island's brief largely parallels the district court's analysis while failing to address the fundamental errors identified in our opening brief. Earth Island's brief does not dispute – or even mention – our argument that the district court applied the wrong legal standard when it held that the Secretary was obliged to give the "benefit of the doubt" to the species. Earth Island's defense of the district court's judgment is premised on selective and inaccurate characterizations of the record, the Final Finding, and the IDCPA. Moreover, Earth Island's theory of the case is fundamentally inconsistent with the deferential standard of review applicable to agency decisions involving a high level of technical expertise. Earth Island urges this Court to repeat the district court's error and substitute Earth Island's conclusions about the weight of the scientific information in the record for those of the Secretary, rather than addressing the proper question: is there an adequate basis in the record for *the Secretary's* conclusions about the weight of the evidence. As demonstrated in our opening brief, and as discussed further below, the answer to that question is yes. In addition, Earth Island has failed to rebut our arguments that the Final Finding

was not influenced by extraneous policy considerations, and that the district court's remedy is unduly restrictive.

I. NOAA FISHERIES CARRIED OUT THE SCIENTIFIC RESEARCH REQUIRED BY THE IDCPA.

Earth Island argues (Br. 32-38) that NOAA Fisheries failed adequately to conduct certain stress-related research required by the IDCPA. While conceding that NOAA Fisheries "did review prior research and did conduct substantial further research," Earth Island argues that the agency violated the statute because its necropsy study and chase and recapture ("CHESS") experiment were based on sample sizes that were not large enough to support population-level inferences. Br. 32. These arguments are unfounded.

The necropsy study and CHESS experiment are two components of the multiple "stress studies" required under section 1414a(a)(3) of the Act. These two studies, in combination with other stress-related studies, abundance surveys, information obtained under the International Dolphin Conservation Program, and "any other relevant information," form the basis upon which the Secretary is to make the Final Finding.[1] 16 U.S.C. §§ 1385(g)(2), 1414a(a). As explained in our

[1] Section 1385(g)(2) provides that the Final Finding is to be based on "the completed study conducted under [16 U.S.C. § 1414a], information obtained under the International Dolphin Conservation Program, and any other relevant information[.]" Section 1414a in turn requires the Secretary, in consultation with (continued...)

opening brief (Fed. Br. 7-9, 30-33), nothing in the IDCPA requires that the necropsy study or CHESS experiment be extensive enough to support population-level inferences. The Act calls for "a review of relevant stress-related research and a 3-year series of necropsy samples from dolphins obtained by commercial vessels" and "an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement," but otherwise leaves the design, size, and methodology of these studies to the agency's expertise and discretion. 16 U.S.C. § 1414a(a)(3)(A), (C). NOAA Fisheries' exercise of that discretion is

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[1](...continued)
the Marine Mammal Commission and the Inter-American Tropical Tuna Commission, to "conduct a study of the effect of intentional encirclement (including chase) on dolphins and dolphin stocks" in order to address whether such encirclement is having "a significant adverse impact on any depleted dolphin stock[.]" 16 U.S.C. § 1414a(a)(1). The study is to include "abundance surveys" and "stress studies," and the stress studies are to include:

> (A) a review of relevant stress-related research and a 3-year series of necropsy samples from dolphins obtained by commercial vessels;
>
> (B) a l-year review of relevant historical demographic and biological data related to dolphins and [depleted dolphin stocks]; and
>
> (C) an experiment involving the repeated chasing and capturing of dolphins by means of intentional encirclement.

16 U.S.C. § 1414a(a)(2), (3).

entitled to judicial deference. *Inland Empire Public Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993) (courts "will not second-guess methodological choices made by an agency in its area of expertise").

Earth Island's contention that NOAA Fisheries violated a Congressional "directive" to carry out necropsy and CHESS studies with sample sizes large enough to support "population-level inferences" (Br. 32, 36, 38) is premised not on the operative statutory language, but on Earth Island's assertion (Br. 35-36, 37 n.11) that smaller sample sizes would thwart the purposes of the IDCPA.[2] That argument might have some force if Congress had intended the Secretary to base his Final Finding solely on the necropsy and CHESS studies. But as the foregoing description of sections 1385(g) and 1414a makes clear, the necropsy and CHESS studies are just two components of the multi-part stress studies, which in turn are only a part of the broad body of information that the Secretary was to consider in making his Final Finding. Indeed, Earth Island itself previously took this view, asserting in comments to the agency that the IDCPA does *not* require that the sample size employed in the CHESS study be large enough to allow the estimation

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[2] The IDCPA does not use the term "populations," but instead calls for a study of "dolphins and dolphin stocks" in order to address whether encirclement is having a significant adverse impact on "any depleted dolphin stock[.]" 16 U.S.C. § 1414a(a)(1). *See also* § 1414a(a)(3)(A) and (C) (referring to studies of "dolphins").

of population-level effects. ER6 AR00174 (arguing that the IDPCA "does not require" that the CHESS study "estimat[e] population-level rather than individual-level effects"). In any event, there is no basis for Earth Island's current argument that the necropsy and CHESS studies – standing alone – must support population-level inferences.

Furthermore, the record does not support Earth Island's assertions that the agency failed to pursue these studies diligently. As explained in our opening brief (Fed. Br. 33-34), NOAA Fisheries was unable, within the time-frame established by the IDCPA, to meet its initial self-imposed goal of 300 necropsy samples per stock. This was due to a variety of problems, including (1) difficulties getting necropsy sample kits through foreign customs so they could be placed on foreign commercial fishing vessels; (2) delays in the issuance by some foreign governments of permits required under the Convention on the International Trade in Endangered Species ("CITES") for the return of necropsy samples to the United States; and (3) lack of cooperation in the sampling effort by some foreign governments and fleets. Earth Island's brief completely ignores the first and second sets of problems, while contending with respect to the third that "Appellants have not demonstrated that they made serious efforts with respect to any of at least four potential sources of a necropsy samples." Br. 34. In fact, the

record shows that the agency, working on its own and through the Department of State, made repeated efforts to secure the necessary international cooperation so that the samples could be collected and analyzed by the end of 2001 and the results included in the Final Science Report. *See, e.g.,* ER8 PD113 at 7 ("Mexico's fleet is the largest in this region, and the help of the Mexican National Observer Program is vital to the success of this research. While some cooperation has been achieved, much more is needed to obtain an adequate number of samples to maximize the validity and certainty of the results of this research project"); ER6 AR00192-94, AR00294-98, AR00768; ER7 AR01968-70; ER8 PD3 at 2; ER8 PD8 at 1-2; ER8 PD85; SER6 AR00414. Indeed, in 1999 Earth Island expressed "deep concern that the government of Mexico and other ETP tuna fishing nations have repeatedly thrown up barriers to research on dolphin stress. * * * [N]one of the stress studies have gone forward except those under the direct control of NMFS * * * because of a lack of cooperation by the government of Mexico *and the flat refusal by other ETP fishing nations to participate in such studies*." ER6 AR00171 (emphasis added). As Earth Island points out (Br. 35), Ecuador, Venezuela, and Columbia eventually professed that they were willing to cooperate. But the record demonstrates that those nations never placed necropsy technicians on any of their ships and never contributed any samples to the

sampling effort. ER7 AR02422-25. While the record does not document the federal agencies' further efforts after these belated offers of cooperation, the absence of such documentation does not establish that NOAA Fisheries "ignored" the offers.

Earth Island's attempt to discredit NOAA Fisheries' explanation of the factors that limited the size of the CHESS sampling effort is similarly unpersuasive. Earth Island argues (Br. 37) that the agency "waited from October 1997 to Summer 2001 to begin the study," but neglects to acknowledge that the timing was driven by the agency's desire to consider preliminary data from the necropsy study before finalizing the CHESS design in order to maximize the study's effectiveness and minimize harm to dolphins. SER6 AR00414. Earth Island supported that approach. *See* ER6 AR00172. Earth Island also questions whether the agency in fact had difficulty recapturing dolphins that were previously captured Br. 37 (citing SER26 and SER17). But the documents Earth Island cites confirm, and explain the reason for, this difficulty: dolphin groups proved to be "highly dynamic," and "few dolphins remained together from one day to the next." SER26 AR05700; *see also* SER17 AR02736 (because "herd dynamics were extremely fluid and multiple animals could not be followed simultaneously, only single focal animals were radio tagged" and "very few non-focal animals" were

recaptured.) And Earth Island's assertion that the effectiveness of the study was limited because it was conducted during "peak hurricane season" (Br. 37) ignores the fact that the time and location of the study area were selected in part on the basis of acceptable weather conditions, ocean currents, and dolphin densities. SER17 AR02729.

Finally, Earth Island greatly understates the value of the information produced by the two studies. NOAA Fisheries has forthrightly acknowledged the limitations of the studies in the Final Science Report and elsewhere, but that is a far cry from an admission that the agency "failed to conduct a scientifically valid analysis," as Earth Island (Br. 32) maintains. To the contrary, the necropsy study yielded important information on naturally occurring diseases, the cause of death in the subject animals, and stress-related injury (ER7 AR08198, AR08202-04), and the CHESS study yielded useful data on exertion-related enzymes and hormones, immune function, thermal condition, and herd behavior, among other things. ER4 AR05577-79; SER26 AR05700 ("The numbers and kinds of biological samples and data collected * * * are unprecedented, and overall the project was successful in meeting its primary objectives"); SER17 AR02751-53; *see also* Fed. Br. 35.

In sum, given (1) the absence of a statutory requirement to collect large sample sizes, (2) the deference due the agency's choice of methodology, (3) the difficulty of the research and lack of international cooperation, and (4) the amount of useful information the studies nevertheless produced, Earth Island's arguments that NOAA Fisheries failed adequately to carried out these studies must be rejected.

II. THE RECORD SUPPORTS THE FINAL FINDING

A. Earth Island does not dispute that the district court applied an incorrect legal standard.

The district court based its holding that the Final Finding is not supported by the record on an incorrect legal standard – specifically, the mistaken view that the Secretary was required to resolve any doubts as to whether the fishery is having a significant adverse impact "in favor of the depleted species." Slip. op. at 36 (citing *Brower v. Evans,* 257 F.3d 1058, 1070 (9th Cir. 2001) (*"Tuna-Dolphin I"*); *see also* slip op. at 19 (the best available science standard "is intended to give the benefit of the doubt to the species") (internal quotation marks omitted). As our opening brief demonstrates (Fed. Br. 42-44), neither the IDCPA nor *Tuna-Dolphin I* impose such a "benefit of the doubt" standard. The district court's application of this standard in its review of the Final Finding is a fundamental error requiring reversal. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of*

America v. United States Department of Agriculture, 415 F.3d 1078, 1095 (9th Cir. 2005) *("R-CALF")* (Because the district court incorrectly interpreted the Animal Health Protection Act to require the Department of Agriculture to remove all risk of mad cow disease entering the United States, "its analysis of the Final Rule's compliance with the APA was fundamentally flawed.")

Earth Island's brief makes no attempt to defend the district court's application of the "benefit of the doubt standard," and indeed does not even mention the issue. This omission, while not dispositive, is telling. *See Beazer East, Inc., v. Mead Corporation,* 412 F.3d 429, 437 n. 11 (3rd Cir. 2005) (while "an appellee does not concede that a judgment should be reversed by failing to respond to an appellant's argument in favor of reversal * * * the appellee waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the [appellant]") (internal citations and quotation marks omitted), *cert. denied,* 74 U.S.L.W. 3275 (U.S. Jan. 09, 2006).

B. Earth Island mischaracterizes the record, fails to address the actual bases for the Final Finding, and fails to give the requisite deference to the agency's scientific judgments.

Earth Island's defense (Br. 38-47) of the district court's holding fails to address the relevant question – whether the record provides a basis for the Secretary's conclusion – and instead invites this Court to substitute Earth Island's

conclusions about the weight of the scientific evidence for those of the Secretary, while at the same time ignoring or mischaracterizing the evidence and reasoning on which the Secretary's Final Finding is actually based. This approach is contrary to the governing APA standard of review. Courts are not empowered to substitute their judgment for that of the agency, and "[d]eference to the informed discretion of the responsible federal agencies is especially appropriate, where, as here, the agency's decision involves a high level of technical expertise." *R-CALF,* 415 F.3d at 1093 (*citing Ariz. Cattle Growers' Ass'n v. United States Fish and Wildlife Service,* 273 F.3d 1229, 1236 (9th Cir. 2001); *see also* Fed. Br. 28-29, 40-41. As this Court explained in *R-CALF,* failure to abide by this deferential standard is legal error:

> [T]he district court committed legal error by failing to respect the agency's judgment and expertise. Rather than evaluating the Final Rule to determine if USDA had a basis for its conclusions, the district court repeatedly substituted its judgment for the agency's, disagreeing with USDA's determinations even though they had a sound basis in the administrative record, and accepting the scientific judgments of R-CALF's experts over those of the agency.

R-CALF, 415 F.3d at 1093-94.

As we demonstrate below, Earth Island's arguments are based on the same flawed approach that this Court rejected in *R-CALF.*

1. The Growth Rate and Direct Mortality Questions – Earth Island contends (Br. 41) that in addressing the growth rate question, NOAA Fisheries "concluded" that "there was a significant adverse impact on depleted dolphin populations[.]" In fact, the Final Finding does not state a conclusion on this issue, in part because the agency's analysis of population modeling indicated that the fishery is not having a substantial effect on population growth rates. ER5 AR06037-38; ER4 AR05532-34; Fed. Br. 38-39.

Furthermore, Earth Island does not dispute that the key question for purposes of the Final Finding is not the growth rate, but whether the purse-seine fishery is having a significant adverse impact on the depleted dolphin stocks. *See* Earth Island Br. 41. Earth Island also does not dispute the Final Finding's conclusion that direct mortality attributable to the fishery is well within the applicable mortality standard. *See* ER5 AR06036; Fed. Br. 18, 39.

2. The Ecosystem Question – Earth Island asserts that the best available scientific evidence "overwhelmingly supported" the conclusion that the dolphin stocks' apparent failure to grow at the predicted rates was not caused by environmental changes in the Eastern Tropical Pacific ("ETP"), and that "[t]he Agency's own scientists determined that ecosystem changes *could not be responsible* for the exceptionally low (and possibly negative) growth rates." Br.

41-42 (emphasis added). Neither of these assertions is accurate. The Final Finding explains that the available data were insufficient to determine whether the carrying capacity or ecological structure of the ETP has substantially changed or declined in a way that could impede the recovery of the three depleted dolphin stocks.[3] ER5 AR06036. This conclusion is based on a variety of factors that are amply documented in the record, including uncertainties regarding the impacts of the El Nino/Southern Oscillation weather pattern and other periodic low-frequency changes in ocean temperatures and trade winds. ER5 AR06035. For example, the Final Science Report's appendix on Ecosystem Studies explains that

> it is unclear whether there has been an ecosystem shift that would affect recovery of dolphin stocks * * *. There is evidence of small physical changes in the ETP around 1977 as part of a persistent, Pacific Ocean-wide shift * * * . *Whether these environmental changes have had negative, positive, or no effects on the recovery of depleted dolphin stocks cannot be determined given the present lack of information on the ecology of these dolphin populations and their environment.* In order to explain the low population growth rates estimated for the depleted dolphin stocks, the carrying capacity of the ecosystem must have been effectively reduced by about 80% for northeastern offshore spotted dolphins and by about 65% for eastern

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[3] Indeed, while NOAA Fisheries proceeded on the assumption that the maximum potential growth rate of the depleted stocks is 4%, the Final Science Report explains that there is only a "modest amount of information" to support that assumption. ER4 AR05601, AR05526. Similarly, while NOAA Fisheries has designated all three dolphin stocks as depleted, the Final Science Report indicates that the abundance of one stock, the eastern spinner dolphin, may be as high as 75% of pre-fishery levels, and thus above the 60% level at which a stock is considered depleted. ER4 AR05512-13.

> spinner dolphins (as they are estimated to be depleted by those amounts from their pre-exploitation levels.) *Such dramatic decreases in carrying capacity seem unlikely, but given our present limited knowledge cannot be categorically ruled out.*

ER4 AR05567 (emphasis added). Similarly, as the Final Finding explains (ER5 AR06035), the five members of the Ecosystem Expert Panel[4] agreed that "there is insufficient information to adequately assess the existence or magnitude of ecosystem changes, or the extent to which these changes have impacted depleted dolphins." One expert (Michael Landry) believed that "such changes provide a credible explanation for at least part of the observed slow recovery of dolphin stocks[.]" FSER3 AR05462. Another (Richard Barber) reasoned that the evidence and model studies "require that we not rule out the possibility that the carrying capacity of the ETP for dolphins has declined." FSER2 AR05427, AR05428. A third expert (Andrew Read) opined that it was unlikely that the ecosystem had changed in a way that could significantly impede or promote the population growth of the depleted stocks, but cautioned that "we do not have a sufficient understanding of the structure or function of the ETP ecosystem to answer this question." FSER4 AR05466, AR05470.

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[4] The Ecosystem Panel was one of two expert panels convened by the Secretary to assess the scientific studies and provide individual scientific comments. *See* Fed. Br. 16.

Earth Island does not address any of the foregoing scientific evidence, but instead points to other evidence in the record that it claims supports its view. As discussed above, that approach is fundamentally inconsistent with the deferential standard of review required by the APA. The question is not whether there is evidence in the record supporting Earth Island's preferred conclusion, but whether there is an adequate basis for the agency's conclusion. *R-CALF,* 415 F.3d at 1093-94.

Furthermore, several of the documents that Earth Island cites in support of its view are much more limited in their conclusions than is apparent from Earth Island's selective quotations. For example, Earth Island (Br. 42) quotes the Final Science Report's statement that "physical and biological data do not support such a large-scale environmental change in the ETP," but omits the next sentence, which states that while such change "appears unlikely, the hypothesis of some degree of reduction cannot be rejected because relevant data are sparse, and the complicated relationships among species and their environment are so poorly understood." ER4 AR5515, AR5536. Similarly, Earth Island (Br. 42) quotes the Marine Mammal Commission's statement that "[i]n our view, the data collected and examined do not support a conclusion that environmental/ecosystem changes have prevented dolphin stocks from recovering," but omits the Commission's

acknowledgment, two sentences earlier, that "[b]ased on the available information, the possibility * * * cannot be ruled out conclusively." ER7 AR5752.

Earth Island (Br. 42) also cites an internal agency memorandum (SER52) to argue that the agency "well knew that non-fishery factors could not account for the [purported] failure to recover." This document is not scientific evidence, but merely a predecisional staff memo prepared to assist the agency decisionmaker, Dr. Hogarth, by proposing one possible interpretation of the science. As such, the memo should have been protected from disclosure under the deliberative process privilege. *See Assembly of the State of California v. United States Department of Commerce,* 968 F.2d 916, 920 (9th Cir. 1992). In any event, because the memo is unsigned, represents the view of only one staff member within the agency, and was not adopted by the agency, it does not "demonstrate" what the agency "knew." *See Long Beach Container Terminal, Inc., v. Occupational Safety and Health Review Commission,* 81 F.2d 477, 479 (9th Cir. 1987) (internal memo by agency staff member describing the intent of a regulation expressed "the view of a particular staff member, not the official view of the Secretary," and that "the mental processes of staff members are totally irrelevant.")

3. The Indirect Effects Question – Earth Island contends (Br. 43-47) that the record "overwhelmingly" supports a finding of significant adverse

impact, asserting that (1) there are "numerous adverse [indirect] effects" of the fishery which "*could plausibly* account for the failure of dolphin stocks to recover," Br. 43 (emphasis added); and (2) given the number of sets on dolphin each year, "*only 2-5 dolphins per set* would have to die or not be born" to account for the assumed shortfall in dolphin population growth. Br. 44 (emphasis in original). While there is support in the record for both these statements, they do not compel the conclusion that the fishery is causing significant adverse impact. Here again, Earth Island simply ignores both the basis for the Final Finding's conclusion and the record evidence supporting that conclusion.

As the Final Finding and the Final Science Report explain, there is substantial uncertainty about the extent of the fishery's indirect effects, and no evidence that these indirect effects are of sufficient magnitude to cause significant adverse impact. Indeed, an indirect mortality rate of "only" 2-5 dolphins per set would be more than 20 times greater than the observed direct mortality rate, and that high rate of indirect mortality is not consistent with the agency's statistical analysis and stock assessment models. ER4 AR05593, AR05596; ER5 AR06037. The Final Finding's conclusion is based on these considerations, plus the strong evidence, well documented in the record, that the direct and quantifiable indirect

impacts of the fishery are only about one third of the applicable mortality limits.[5] ER5 AR06037; *see* Fed. Br. 17-20, 36-40.

Further, in asserting that the members of the Indirect Effects Panel concluded that the tuna fishery was "the likely cause" of the apparently low population growth rate (Br. 45), Earth Island overstates the conclusiveness of the panelists' views. As the Final Finding explains, the panelists agreed that indirect effects, especially cow-calf separation and increased likelihood of predation, "may" account for the lack of expected dolphin recovery, but "[t]he strength of their opinions varied greatly" and reflected the "large amounts of uncertainty in the data." ER5 AR06037. As one of the panelists put it,

> with the absence of succinct data, or clear and consistent observations, *we have no way of separating fact from conjecture* based on experiences with other species in other more or less

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[5] Thus, Earth Island is wrong when it asserts (in its Statement of Facts, but not in its argument) that the Final Finding's conclusion was a "default[]" decision made because "the evidence was purportedly insufficient to answer the question at all." Br. 23, 24. The Final Finding reflected the Secretary's weighing of the best scientific evidence available, some of which was contradictory or inconclusive. The Secretary found the evidence to be inconclusive on the ecosystem question, but sufficient to allow conclusions on the direct effects and indirect effects questions. ER5 AR06036 ("direct mortality [from the fishery] does not exceed [potential biological removal], or any other appropriate mortality standard"); ER5 AR06037 ("indirect effects * * * are not impacting dolphins to a degree that would risk or appreciably delay recovery"). On balance, the Secretary found that the evidence supported the ultimate conclusion that the fishery is not having a significant adverse effect on the depleted stocks. The Final Finding unambiguously states that conclusion. ER5 AR06032.

> comparable stressor situations. We can but forward our best guess at what might be happening.
>
> Clearly, we need more information in data generated from direct sampling, as well as from population modeling analyses. * * * The process requires more than speculation.

SER21 AR05437-38 (emphasis added).

C. Earth Island's reliance on *Tuna-Dolphin I* is misplaced.

Earth Island repeatedly attempts to draw parallels between the Final Finding and the Initial Finding vacated by this Court in *Tuna-Dolphin I. See, e.g.,* Br. 1-2, 8, 21, 23-24, 36, 47-48, 56, 58-59. In doing so, Earth Island ignores the fundamental differences between the two findings.

In the Initial Finding at issue in *Tuna-Dolphin I,* the Secretary authorized a change in the dolphin-safe labeling standard after he concluded that there was insufficient evidence to determine whether the fishery was having a significant adverse impact on the depleted stocks. *Tuna-Dolphin I,* 257 F.3d at 1064. The Secretary maintained that the labeling change was justified in part by "international concerns and competing policies for protecting dolphins," and that the IDCPA permitted the labeling change because there was no conclusive evidence that the fishery was causing significant adverse impacts. *Id.* at 1065-66.

This Court rejected that "default" approach, holding that the IDCPA required the Secretary to provide a "yes" or "no" answer to the statutory question,

and that the answer must be based solely on scientific evidence and not on policy concerns. *Id.* at 1066-67. Further, the Court held that the Secretary acted unlawfully when he failed to commence the stress studies mandated by the Act prior to the Initial Finding, and "did not incorporate *any* stress study evidence" in the Initial Finding. *Id.* at 1068-69 (emphasis in original). Finally, the Court held that because the IDCPA required the Secretary to determine whether or not the fishery was having a significant adverse impact, and because "*all* of the evidence indicated that dolphins were adversely impacted by the fishery," the Secretary acted contrary to law and abused his discretion when he claimed insufficiency of evidence. *Id.* at 1070-71 (emphasis in original).

In contrast to the Initial Finding, and as described above and in our opening brief, the Final Finding is not a "default" conclusion based on insufficient evidence. Rather, it expressly answers the statutory question, and does so on the basis of scientific evidence, not policy considerations. In addition, the Final Finding is based on the extensive research – including the mandated stress studies – that was completed after the Initial Finding was issued, and which provides ample support for the conclusion that the fishery is not having a significant adverse impact on any depleted dolphin stocks. Accordingly, Earth Island's numerous suggestions that Final Finding repeats the errors of the Initial Finding –

a kind of administrative "guilt by association" – are unfounded and must be rejected.

III. THE FINAL FINDING WAS BASED ON SCIENCE, NOT EXTRANEOUS POLICY CONSIDERATIONS.

A. Earth Island has failed to respond to the Secretary's argument that his decision was based on scientific grounds and not extraneous policy or political considerations.

An agency action must stand or fall on the basis of the agency's stated rationale. *R-CALF,* 415 F.3d at 1093. Our opening brief demonstrates (pp. 44-46) that the district court ignored this fundamental principle when it held that the Final Finding was based on extraneous policy and political concerns even though the agency's stated rationale was purely scientific. Earth Island's brief makes no response to this argument.

Furthermore, Earth Island is wrong when it asserts (Br. 55) that "Appellants do not bother to contest the undeniable evidence" that the Final Finding was driven by political and policy concerns. In fact, our opening brief (pp. 46-50) discusses in detail why the evidence cited by the district court and Earth Island does not support the district court's conclusion. Earth Island's brief makes no response to these arguments either.

B. The subjective motivation of agency decisionmakers is immaterial.

Earth Island does not contend that it was improper for the Secretary of State or the member-governments of the Inter-American Tropical Tuna Commission to comment on the decision-making process, or for the Secretary to (forthrightly) include the comments received in the administrative record. Earth Island instead focuses on what it believes to be the subjective motivations of the agency decisonmaker. Earth Island's argument (Br. 47-56), which largely repeats the flawed analysis of the district court, illustrates why inquiry into the subjective motivation of agency decisionmakers is generally "immaterial as a matter of law." *In re: Comptroller of the Currency,* 156 F.3d 1279, 1279-80 (D.C. Cir. 1998). Earth Island – like the district court – reasons that *because* the Final Finding is [purportedly] contrary to the best available scientific evidence, it *must have been* based on politics and policy.[6] But as we have shown above and in our opening brief, there is ample support in the record for the Final Finding, and thus no basis

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[6] *See, e.g.,* Earth Island Br. at 47 ("If one wondered why Appellants reached such an anomalous decision, the record provides a clear answer: * * * 'political meddling'"); *id.* at 53 (record reveals "success for the campaign to ignore the scientific evidence"); *id.* at 56 (no reason to believe agency would have "ignored" the science "in the absence of political pressure").

for concluding that it must have been based on political considerations.[7] On the other hand, if Earth Island were correct that the Final Finding is contrary to the best available scientific evidence, that fact alone would require that the Final Finding be vacated. *R-CALF*, 415 F.3d at 1093. Thus, in either instance, there is no reason to inquire into the subjective motivation of the decisionmaker.[8]

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[7] Indeed, much of the purported "influence" cited by Earth Island is utterly inconsequential. For example, Earth Island contends (Br. 50-51) that the State Department and Mexico "successfully lobbied" the Secretary in the formulation of the Organized Decision Process ("ODP"). But Earth Island does not contend that there is anything unlawful about the ODP, and indeed Earth Island's arguments on the merits embrace the ODP's analytical framework, *i.e.,* the ecosystem, population growth, direct effects, and indirect effects questions.

Similarly, Earth Island (Br. 51-52) cites as evidence of political influence a statement by the Department of Commerce Under Secretary for International Trade Administration, who said, in response to tuna industry complaints that NMFS (NOAA Fisheries) was biased, that "Secretary Evans, not the NMFS, will make the determination." SER30. Given that (1) the IDCPA expressly provides for "the Secretary" to make the determination; (2) the Final Finding was in fact made by Dr. Hogarth, the Assistant Administrator of NMFS, acting on behalf of the Secretary (ER5 AR06032); and (3) Earth Island does not question the Secretary's authority to make or delegate the decision, the Under Secretary's statement cannot reasonably be construed as evidence of political influence. Furthermore, Earth Island neglects to mention that the Under Secretary also told the tuna industry representatives that the Final Finding "will be based on the scientific record and not on politics." SER30.

[8] Here again, Earth Island's invocation (Br. 47-48) of *Tuna-Dolphin I* is unavailing, because the agency's rationale in that case expressly included policy considerations. *Tuna-Dolphin I,* 257 F.3d at 1065-66. Thus, *Tuna-Dolphin I* provides no support for the proposition that a court may disregard an agency's (continued...)

IV. THE DISTRICT COURT'S REMEDY IS UNDULY PROSCRIPTIVE.

Even if this Court agrees with the district court's conclusion that the Final Finding should be set aside, the district court's remedy must be modified. As our opening brief demonstrates (pp. 50-56), the district court erred when it (1) purported to order federal officials to enforce the dolphin-safe labeling provision; (2) purported to enjoin agencies not before the court; and (3) declined to remand to the agency for further proceedings. Earth Island offers no response to our arguments on the first two of these points.

On the third point, Earth Island argues (Br. 56-60) that the district court's refusal to remand was "not an abuse of discretion" because further agency proceedings would be "not useful." Br. 56. Earth Island is wrong on both the standard of review and the substance of its argument.

A. This Court's review of the remedy is *de novo.*

Earth Island contends (Br. 58, 30) that district court's choice of remedy is reviewed for abuse of discretion because the remedy was "principally determined by factual assessments." Earth Island offers no authority for this proposition, however. Moreover, this case did not involve factual assessments or fact-finding

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[8](...continued)
stated rationale and focus instead on an inquiry into the decisionmaker's subjective motivation.

by the district court; rather, the district court granted summary judgment following APA review on the administrative record. Accordingly, this Court's review of the district court's remedy, like its review of the rest of the judgment, is *de novo*. *See Asarco, Inc. v. U.S. Environmental Protection Agency,* 616 F.2d 1153, 1161 (9th Cir. 1980) ("District court review of agency action is generally accorded no particular deference, because the district court, limited to the administrative record, is in no better position to review the agency than the court of appeals.")

B. A remand for further proceedings would not be futile.

"Because a reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry, the proper course of action where the record before the agency does not support the relevant agency action is to remand to the agency for additional investigation and explanation." *UOP v. United States,* 99 F.3d 344, 351 (9th Cir.1996) (*quoting Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 744 (1985)) (internal quotation marks omitted).

Earth Island contends that this case falls within the exception to this rule described in *Sierra Club v. EPA,* 346 F.3d 955, 963 (9th Cir. 2003). In *Sierra Club,* this Court remanded to the agency with instructions, after finding that the record was fully developed, the conclusions that must follow from it were clear,

and further administrative proceedings would serve no useful purpose. 346 F.3d at 963. Earth Island's reliance on *Sierra Club* is misplaced. As demonstrated in our opening brief (pp. 54) and discussed further below, this case is distinguishable from *Sierra Club* because the record does not support only one possible outcome, and further administrative proceedings would allow the agency to remedy the purported defects in the Final Finding that are the basis for the district court's judgment.

Earth Island argues that further administrative proceedings would not be useful here for three reasons, none of which withstands scrutiny. First, Earth Island claims (Br. 58) that because the December 2002 deadline for the Final Finding has passed, and the original Congressional authorizations of research funding have expired, the agency has no authority or funding to take any further action. Earth Island cites no legal authority for this proposition, however, and as discussed in our opening brief (pp. 53-54), the Supreme Court has recently held that provisions requiring the government to act within a specified time, without more, should not be construed as a jurisdictional limit precluding action later. *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 158 (2003); *see also Idaho Farm Bureau Federation v. Babbitt,* 58 F.3d 1392, 1400 (9th Cir. 1995) ("failure of an agency to act within a statutory time frame does not bar subsequent agency action

absent a specific indication that Congress intended the time frame to serve as a bar").[9] Earth Island makes no attempt to reconcile its argument with these authorities.

Furthermore, Earth Island is wrong on the facts. The IDCPA includes ongoing authority for the Secretary to "undertake or support" additional scientific research to "further the goals of the International Dolphin Conservation Program." 16 U.S.C. § 1414a(b). Congress has continued to appropriate funds for research

[9] Courts frequently remand to an agency for further consideration even though the original statutory deadline for the agency action has passed. *See, e.g., Association of Pacific Fisheries v. Environmental Protection Agency,* 615 F.2d 794, 881 (9th Cir. 1980); *Appalachian Power Co. v. EPA,* 135 F.3d 791 (D.C. Cir. 1998); *Environmental Defense Fund, Inc. v. EPA,* 898 F.2d 183 (D.C. Cir. 1990).

on the effects of the tuna fishery on dolphins in the ETP,[10] and the agency is continuing to carry out such research.[11]

Second, Earth Island claims (Br. 58) that the agency's "repeated intransigence" justifies the district court's prohibition on further proceedings. But here again Earth Island provides no legal authority for its position. Furthermore,

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[10] For FY 2003, see Consolidated Appropriations Act, 2003, Pub. L. No. 108-7, 117 Stat. 11 (2003), and H. R. Conf. Rep. No. 108-10, at 707, 711 (2003) ("Although the National Marine Fisheries Service recently submitted it's [sic] completed science report required by the [IDCPA], the conference agreement includes $2,700,000 for research on dolphin encirclement in the eastern tropical Pacific") (attached at Tab 1).

For FY 2004, see Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (2004); H. R. Conf. Rep. No. 108-401, at 588 (2003) (adopting by reference NOAA funding language of S. Rep. No. 108-144 (2003)); and S. Rep. No. 108-144, at 89, 96-97 (Senate Appropriations Committee Report) (attached at Tab 2).

For FY 2005, see Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809 (2005); H. R. Conf. Rep. No. 108-792, at 805 (2004); and S. Rep. No. 108-344 at 101 (attached at Tabs 3 and 4).

For FY 2006, see Science, State, Justice, Commerce, and Related Agencies Appropriations Act, Pub. L. 109-108, 119 Stat. 2290 (2005), and H. R. Conf. Rep. 109-272, at 148 (2005) (attached at Tab 5).

[11] *See, e.g.,* Tim Gerrodette et al., *Preliminary Estimates of 2003 Dolphin Abundance in the Eastern Tropical Pacific*. (National Marine Fisheries Service, Southwest Fisheries Science Center, Administrative Report LJ-05-05) (2005), *available at* swfsc.nmfs.noaa.gov/PRD/PROGRAMS/ETPCetacean/Gerrodetteetal2005.pdf.

the record does not support this characterization of the agency's actions. To the contrary, after the issuance of the Initial Finding, the agency developed the ODP and undertook a substantial research effort that included the preparation of 34 peer-reviewed scientific studies and the Final Science Report. ER3; ER4 AR05542-45; ER5 AR06033; *see* Fed. Br. 11-16.

Third, Earth Island claims (Br. 59) that a remand is unnecessary because the evidence in the record is "sufficient" to conclude that the fishery *is* having a significant adverse impact on the depleted dolphin stocks. But as discussed above, much of the data in the record is inconclusive. Furthermore, Earth Island's argument is inconsistent with its contentions that the agency's necropsy and CHESS studies were inadequate. Indeed, Earth Island's argument tacitly assumes that if those studies had used samples large enough to draw population-level inferences, the results would support Earth Island's view. There is no basis for that assumption.

More fundamentally, Earth Island's argument is contrary to basic principles of administrative law. Congress assigned the task of making the finding required under 16 U.S.C. § 1385(g)(2) to the Secretary, not the courts. Even if the record were "sufficient" to support Earth Island's favored conclusion, that would not

provide a justification for the court to substitute its judgment for that of the Secretary. *See R-CALF,* 415 F.3d 1093; *UOP,* 99 F.3d at 351.

CONCLUSION

For the reasons set out above and in the government's opening brief, the judgment of the district court should be reversed. In the alternative, the remedy ordered by the district court should be vacated with instructions for the district court to remand the Final Finding to the Secretary for further proceedings.

Respectfully submitted,

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February 2006

90-8-8-05514

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points or more, and contains 6996 words of text.

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Mark R. Haag

CERTIFICATE OF SERVICE

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